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Appeal

Brief

IN THE

Court of Appeals of the District of Columbia.

OCTOBER TERM, 1901.

LONE WOLF ET AL., APPELLANTS.

v.

ETHAN A. HITCHCOCK ET AL.

No. 1109, *Equity.*

Appeal from the Supreme Court of the District of Columbia.

BRIEF OF APPELLANTS IN OPPOSITION TO APPELLEES' MOTION TO DISMISS THE APPEAL.

STATEMENT.

Counsel for appellants has been notified that on Tuesday, December 3d, appellees will submit a motion "to dismiss the pending appeal in this case, upon the ground that that which is sought to be restrained has already been performed and accomplished."

Counsel for appellants, owing to the fact that he is compelled to leave the city for a few days without being able to see appellees' brief in support of this motion, is at a loss to anticipate the facts and the law which will be submitted in support of this motion. But counsel for appellants takes issue with the appellees upon the question of fact "that that which is sought to be restrained has already been performed and accomplished."

The Injunction.

By reference to the bill of complaint in this case (Record, pages 1 to 15), it will be seen that appellants seek to enjoin and restrain the appellees from carrying into effect section 6 of an act of Congress entitled, "An act to ratify an agreement with the Indians of the Fort Hall Indian Reservation, in Idaho, and making appropriation to carry the same into effect," approved June 6, 1900 (see 31 U. S. Stats. at Large, 676–681). Two other acts of Congress were cited, one approved March 3, 1901, and the other January 4, 1901, as supplementary to the act first named. The provisions of those acts which appellants insist are unconstitutional and void, and to prevent the carrying of which into effect, this suit was brought, were pointed out in the bill of complaint in detail; and the bill prayed that appellees be commanded "to absolutely desist and refrain from doing any of the acts and things complained of, as herein set forth, and especially from proceeding further in carrying into effect the provisions of said void acts of Congress." There was also a prayer for such other and further relief as the nature of this case may require.

Appellants concede the fact that some of the acts complained of have been accomplished. But they insist that there are many provisions of the acts of Congress, against

the execution of which an injunction is prayed, that have not yet been performed and accomplished, and in proof of this allegation, appellants cite the following:

First. In Article 3 of the alleged agreement, which is a part of the act of June 6, 1900, it is provided that sections 16 and 36 of the lands in question should not be subject to homestead entry, but that they should be held and sold for public school purposes. And by another provision of the act these sections of land were to be conveyed to the Territory of Oklahoma for public school purposes. As all this land, including sections 16 and 36, belongs to the Indians, as contended by appellants, there is no valid authority for turning over these sections to the Territory of Oklahoma for general school purposes.

Appellants are not advised as to whether these sections have at this time been patented to the Territory of Oklahoma or not. But if they have been so patented, such conveyances would be utterly void, and the acts of the appellees in issuing the patents would be *ultra vires* and without valid authority.

Second. By Article 5 of the alleged agreement, which is a part of the act of June 6, 1900, it is provided that the titles to allotments are held in trust by the United States for the allottees for twenty-five years, as is provided in the general allotment acts of February 8, 1887, and February 28, 1891. Thus it appears that it will be twenty-five years before this part of the act can be fully carried into effect.

Third. By Article 6 of the alleged agreement, which is a part of the act of June 6, 1900, the United States agrees to pay the Indians $2,000,000.00 for the land to be opened to settlement by white men, and $500,000.00 of this amount were appropriated "to be distributed per capita to the members of said tribes at such times and in such manner as the Secretary of the Interior shall deem to be for the best

interests of said Indians." And that the other $1,500,000.00 must remain in the Treasury of the United States, and draw interest at 5 per cent, which interest shall annually be paid to said Indians by the Secretary of the Interior per capita.

No part of this appropriation has as yet been paid to said Indians, and payments of interest from year to year, as it accrues, cannot be fully performed or accomplished until an indefinite time in the future. If the injunction prayed by the bill of complaint is granted, no part of the $500,000.00 already appropriated can be paid out, for the reason that the Indians have never agreed to sell their land and the appropriation to pay for such land would be an unlawful disposition of the public revenues. If there were no other part of the act of June 6, 1900, which had not yet been carried into effect, this provision would be sufficient to warrant the issuing of the injunction.

Fourth. One of the provisions of the act of June 6, 1900, is to the effect that the settlers upon the lands opened to settlement—about two million acres—may, after fourteen months, commute their entries by cash payments at $1.25 per acre, and if they elect to do so, patents may issue at that time. It will be at least a year from this time before such commutation and cash payments can be made. Hence no patents have as yet issued to the thirteen thousand homesteaders who have located on said lands, and none can issue for more than a year from this time. Appellants insist that the issuance of such patents would be in violation of their property rights, and that the appellees have no valid authority for issuing them. The bill of complaint in this case prays the court to enjoin the issuing of such patents, as this would be carrying said act into effect. This has not been performed or accomplished, and the injunction should issue to prevent such unlawful acts.

Fifth. The act of June 6, 1900, contained a provision extending the mining laws of the United States, upon the passage of the act, over the lands allotted to said Indians or opened to settlement (Record, page 11.) Counsel for appellees has cited in his brief, pages 82 to 88, an opinion approved by the Secretary of the Interior, which practically nullifies this provision of the act. But this opinion may be overruled at any time by the Secretary or by his successor, and he may hereafter decide that he has the authority under said provision to recognize as lawful mineral locations upon said lands. Appellants insist that the evident intent of said provision was to extend the mining laws of the United States over their lands, in violation of the Medicine Lodge Treaty, and that the provision is wholly void. They desire the opinion of this honorable court to this effect, and an injunction restraining the Secretary of the Interior and the Commissioner of the General Land Office from ever hereafter permitting mineral locations to be made upon the lands in question. Nullification by judicial decree is preferable to nullification by an executive order.

The Law of the Case.

In the case of Young *v.* Campbell (75 N. Y. 525), it was held by the Court of Appeals of New York, that the fact that the object of the suit may be defeated by refusing a temporary injunction, does not of itself deprive the court of all discretionary power in the matter.

There is a prayer in the bill for "such other and further relief as the nature of the case may require." Under this general prayer, notwithstanding the fact of the refusal of a temporary injunction, and the utter disregard of the pending application for an injunction by the appellees, this court is not deprived of its discretion, or of its power and jurisdiction to enjoin further acts of appellees in the matter of carrying said void acts of Congress into effect. As long

as there is any one act which remains to be performed under said void acts of Congress, or any equitable right threatened, this court may enjoin such act.

In the case of Holmes *v.* Calhoun County (66 N. W. Rep. 145), the Supreme Court of Iowa held that where a part of the relief prayed for could be granted, the injunction as to that should be allowed.

This authority is exactly in point. But it hardly seems necessary to cite an authority to sustain a proposition so thoroughly just and equitable.

In Conclusion.

Counsel for appellants contends that his clients are entitled to a judgment in this case as of the date of the dismissal of the bill of complaint by the court below. This court has no original jurisdiction. Its powers are purely appellate. Nothing but the death or resignation of office of the appellees, or an act of Congress taking away this court's appellate jurisdiction, can take away their power and jurisdiction to hear and determine this case upon the facts as they appeared in the record when the appeal was prayed and taken in this case. Appellees should not be permitted to come into a court of equity and set up the fact that they have taken advantage of the failure of the court below to issue the temporary injunction and have performed those acts, pending an appeal in the case, which the bill of complaint sought to enjoin. It would have been more in accordance with precedent and with a due regard for the dignity of the courts, if a temporary injunction had been conceded, and the appellees had awaited the judgment of this court and of the Supreme Court of the United States before proceeding further in a case of such grave import and of such far-reaching consequences.

WILLIAM M. SPRINGER,
Solicitor for Appellants.